VIRGINIA SECTION

INVESTMENTS BY FIDUCIARIES.—VA. CODE 1919 § 5431.—Prior to recent legislation in this State, there seems to have been no definite rule for the guidance of fiduciaries in the investment of trust funds, other than the somewhat vague principle, laid down in many cases by the Virginia court, that in making such investments the fiduciary must act honestly and prudently, exercising the same care and foresight as if the funds were his own. The fullest discussion of the general rule is probably found in *Myers* v. *Zetelle* (Va.) 21 Gratt. 733.

While in a number of other states the character of securities in which fiduciaries may invest is fixed with some definiteness, either by statute or by rules of court, prior to the statute presently to be indicated a very wide discretion was left to the fiduciary in this State. Originally in England, such investments were limited to the obligations of the English government. The situation in England has since been relieved by the Trustees Relief Acts, and the field of investment much enlarged.[1] In New York, the court seems to have held that bank stocks, or shares in insurance companies or railroads, and similar enterprises, are improper trust investments, and that those which the court would sanction are confined to real estate, bonds of individuals secured by first mortgages of real estate, first mortgage bonds of corporations, and 'principal' (governmental?) securities.[2] The Massachusetts court, on the other hand, is much more liberal, and what is known as the Massachusetts doctrine prevails quite generally in the United States.[3] Under this rule, in addition to the class of securities sanctioned in New York, shares of established and prosperous corporations, such as banks, railroads, industrial and insurance corporations, and notes secured by such shares as collateral, bank certificates of deposit, and government and municipal bonds generally, are regarded as proper investments, when made with due precaution.[4] In the case last cited in the foot note, Field, C. J., said:

> "A trustee in this Commonwealth undoubtedly finds it difficult to make satisfactory investments of trust property. The amount of funds seeking investment is very large; the demand for securities which are safe as is possible in the affairs of the world, is very great; and the amount of such securities is small, when compared with the amount of money to be

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[1] See LEWIN ON TRUSTS, ch. xiv., Sec. 4.
[2] King *v.* Talbot, 40 N. Y. 76.
[3] See LORING'S TRUSTEE'S HANDBOOK, 93, *et seq.*
[4] See Harvard College *v.* Amory (Mass.), 9 Pick. 446; Hunt, Appellant, 141 Mass. 515; Dickinson's Appeal, 152 Mass. 184.

> invested. * * * Our cases show, however, that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments."

This is believed to be a fair statement of the rule prevailing in Virginia; and to the list of securities mentioned in the opinion, there might be added, as by far a more attractive investment from the viewpoint of safety, and as accepted almost universally as securities of the highest class, bonds of the several states of the Union, and municipal obligations of cities, towns and counties, whether of the home state or not. Selected securities of this character are uniformly approved for investment by the New England savings banks, and by the great life insurance companies, both probably representing the most carefully guarded trusts in America.

This, as believed, being fairly representative of the situation in Virginia until quite recently, it may be of interest to the public generally, and particularly to the members of the bar, to call attention to some recent Virginia legislation on the subject. This legislation began in 1914, and was carried into the Code of 1919, in substantially similar form, as § 5431, amended several times since in immaterial particulars, the last amendment appearing in Acts 1920, page 556.

The amended Act applies to "executors, administrators, trustees and other fiduciaries" (not indexed under "Trustees") and declares that they "may invest" in the following securities, "which shall be considered lawful investments": 1. Bonds of this State, known as "Riddlebergers" and "Centuries". 2. Obligations of the United States, including the District of Columbia. 3. Federal Farm Loan Bonds. 4. Bonds of cities, towns and counties *in Virginia,* when issued under prescribed conditions 5. Bonds and *negotiable* notes (why not non-negotiable as well?), secured by first mortgage, or first deed of trust (but not by first vendor's lien?) on unencumbered real estate *in the State of Virginia, "not to exceed* 80 *per centum of the assessed value* of said real estate and improvements"—with special provisions as to title, and fire insurance thereon.

This Act at once raises several interesting and practical questions, some of them not easily solved: 1. Is the Act meant to be *exhaustive?* Are investments by trustees in this State confined to this brief list? It can scarcely be meant as an enabling act, and (save as to the provision permitting loans up to 80 *per centum* of the value of the security) as intended to *enlarge* the field of permissible investment by fiduciaries, since the few investments named were *all proper investments anterior to the Act.* To give

the Act some meaning then, *ut res valeat,* it seems necessary to presume that it was meant to be exhaustive, and as a substitute for the existing unwritten and more elastic rule. 2. If thus exhaustive, then are not fiduciaries in this State limited in their investments to this brief statutory catalogue of securities, in the absence, of course, of specific directions in the trust instrument? And must trustees who have already invested otherwise, take notice that such other investments are disapproved by the legislature, and are held at the peril of the fiduciary? 3. Does the Act mean that courts of equity in this State may no longer exercise their own discretion in the selection of investments for trust funds under their control, or in advising and authorizing investments on the application of fiduciaries for the aid and advice of the court?

For the legislature of Virginia to declare that bonds, for example, of the State or City of New York, and of every other state and city in the United States beyond our own borders, not to mention high class railroad bonds and other equally standard securities, are not lawful investments for fiduciaries in this State, would seem to be the height of provincialism and unwisdom, and the more conspicuously so when we recall the history of Virginia's own bonded indebtedness. What policy suggests the restriction of these investments to so limited a field? But, to repeat, if not meant thus to be restrictive, then one may well ask, what need is there for the statute, and *what does it accomplish?*

In spite of our question, it must be conceded that the Act does accomplish one purpose, at least, namely, in authorizing fiduciaries to lend any and all trust funds on real property mortgages, to an amount not exceeding 80 *per centum* of the "assessed" value of the security. "Assessed" value probably refers to the value placed on the property for purposes of taxation. Before the statute, the rule generally followed by careful investors was that the loan should not exceed 50 *per centum,* or thereabouts, of the *market* value of the security, as estimated by competent persons. The latter rule is one easy to apply, works with uniformity throughout the State, and leaves an abundant margin of safety. The statutory rule, on the other hand, may leave only 20 *per centum* of margin in sections where the assessment of real estate equals the market value, while in other (and most) sections, where the assessed value is below the market value, the margin of safety is on a sliding scale, reaching, in specially favored sections, a point far above the approved margin of 50 *per centum.* For instance, where, in a particular section, real property is assessed on the basis of 50 *per centum* of the market value, the margin of safety would rise to 60 *per centum,* leaving the property legal security for only 40 *per centum* of its real value. To illustrate: Before the statute, the owner of desirable real estate, of the market value of $10,000, could readily borrow $5,000 thereon, or 50 *per centum* of its value. Under the statute, if the property were assessed at $5,000, as most likely it would be outside of the cities, no fiduciary could accept it as security for more than 80 *per centum,* or $4,000.

This particular provision, therefore, seems especially subject to serious objections. The small margin of safety which may result, is one with which no prudent man would be satisfied in making a loan of his own funds, and one that no experienced lawyer or banker would permit a client or customer to accept. *Per contra,* where the assessment is far below the real value, the effect of the statute is to diminish the value of real property as a security, and consequently its availability to the owner for that purpose.

When, therefore, the unwritten rule, or custom, is compared with the statutory rule, one may well doubt whether the old is not better than the new, and may well ask what real purpose was intended to be accomplished by this particular provision, or indeed by any other provision within the four corners of the Act.

When it is remembered with what care equity has established its very safe and reasonable rules for the protection of the funds of widows and orphans, lunatics, and other dependent persons, and of charitable and educational institutions, and similar trusts, one cannot but deplore any relaxation of these rules, or any restriction of the field for the selection of investments by those charged with the safeguarding of such funds. On the whole, this entire legislation seems unwise, as unsettling old and established rules, as jeopardizing the safety of trust funds, as unreasonably restricting fiduciaries in the selection of investments, and, finally, as inviting litigation to interpret its meaning.

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WILLS—CONSTRUCTION—THE DOCTRINE OF MAY *v.* JOYNES—HOW AFFECTED BY § 5147, CODE 1919.—*If an estate be limited for life, but with absolute power of disposition in the life tenant, then the fee passes and any remainder over is void.* Such is the doctrine of *May* v. *Joynes.*[1] It is the purpose of this article to discuss the status of the doctrine in Virginia today. For convenience of treatment, the doctrine will be divided into two parts and these parts discussed separately.

(1) *If any estate be limited for life, but with absolute power of disposition by deed inter vivos as well as by will, then the fee passes.* That such is the law in Virginia today is reaffirmed by the Supreme Court of Appeals in the case of *Davis* v. *Kendall,*[2] decided in June, 1921. Whatever may be the view in other jurisdictions, [3] the Virginia court sees in this doctrine the true inter-

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[1] 20 Gratt. 692.

[2] (Va.) 107 S. E. 751. Other cases holding this doctrine are Farish *v.* Wayman, 91 Va. 430, 21 S. E. 810, Note, 1 Va. Law Reg. 219; Bing *v.* Burrus, 108 Va. 478, 56 S. E. 222; Honaker *v.* Duff, 101 Va. 675, 44 S. E. 900; Brown *v.* Strother, 102 Va. 145, 47 S. E. 236; Note, 3 Va. Law Reg. 65.

[3] In many jurisdictions, the will of the testator is thought to be found in the literal meaning of the words which he uses. The devise of a life estate with absolute power of disposition is looked upon as